FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 463

WILLIAM KIDD and BARBARA MILLS,

Appellants,

v.

STATE OF OHIO,

Appellee.

Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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v.

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JURISDICTIONAL STATEMENT

Appellants, William Kidd and Barbara Mills, submit the following statement in support of their contention that the federal constitutional questions presented herein are substantial and that there is sufficient basis to invoke the jurisdiction of this Court to review on appeal the judgment and order of the Supreme Court of Ohio in Cases No. 35215 and 35216 consolidated before it, sustaining the constitutionality under both the federal and state constitutions of Ohio Revised Code, Section 3773.24. This single jurisdic-

tional statement is filed under authority of Rule 15, Paragraph 3 of this Court.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is officially reported in 167 O. S. 521, 150 N. E. (2nd) 413. A copy of this opinion is reprinted herein as Appendix "A."

A copy of the opinion of the Court of Appeals, Hamilton County, Ohio, as furnished counsel is attached hereto as Appendix "B." Since said decision refers to a decision announced concomitantly therewith, the same is also reprinted in Appendix "B." The latter is reported in 105 Ohio App. 546, 143 N. E. (2d) 849. The Municipal Court of Cincinnati rendered no opinion. The Judgment Entry of the Supreme Court of Ohio and the entry of that Court denying Appellant's application for rehearing are attached hereto as Appendices "D" and "E" respectively.

JURISDICTION

These proceedings were originally initiated by the filing of affidavits in the Municipal Court of the City of Cincinnati, alleging criminal violation of Ohio Revised Code 3773.24, commonly called the Sunday Closing, Sunday Prohibitions, or Blue Sabbath Desecration Law. The defendants were both convicted; Kidd was fined ten dollars and costs; Mills was assessed the costs of court. Stay bond, pending the outcome of this appeal, has been posted and approved by the lower courts.

The section under which the appellants were convicted, Ohio Revised Code 3773.24, is set forth in its entirety in Appendix "C" hereto. Also set forth in Appendix "C" are the other Ohio Sunday laws inasmuch as the Supreme Court of Ohio in the case of *Stanfeal* v. *State*, 78 O. S. 24, enunciated the doctrine that all the Ohio Sunday laws are

to be regarded in pari materia and construed together and as one act.

The Ohio Revised Code 3773.24 provides no person over fourteen years of age shall engage in common labor or open or caused to be opened a building or place for transaction of business, or require a person in his employ or under his control to engage in common labor on Sunday. The section does not apply to work of "necessity or charity" and does not extend to persons who "conscientiously" observe the seventh day of the week as the "Sabbath" and abstain thereon from doing things prohibited on Sunday. The section does not prevent emigrating families from traveling, watermen from landing their passengers, and keepers of toll bridges, tollgates, or ferries from attending them on Sunday. (All quotes indicated are from the statute.)

Ohio Revised Code 3773.23 prohibits theatrical, dramatic, or other type of exhibitions on Sunday and baseball playing and motion pictures in the forenoon. Ohio Revised Code 3773.25 forbids on Sunday, sporting, rioting, quarreling, hunting, fishing, or shooting. Other Sunday laws and the penal provisions appear in Appendix "C." The length of the various statutory provisions required their insertion by appendix as permitted by Rule 15, 1 (b) (v) of this Court.

The convictions of the appellants were appealed from the Municipal Court of Cincinnati to the Court of Appeals for Hamilton County, Ohio (First Appellate District of Ohio), which affirmed the same. Appeal was taken to the Supreme Court of Ohio. Judgment entry affirming the ruling of the Court of Appeals was entered on April 30, 1958 (see Appendix "D"). The appellants filed application for rehearing, which was denied by entry of the Court on May 21, 1958 (see Appendix "E"). Notice of Appeal

to the United States Supreme Court was filed in the Supreme Court of Ohio on July 15, 1958 (see Appendix "F"). On August 26, 1958, due to delays in the transmission of the record beyond the control of the appellants, for good cause shown, the Supreme Court of Ohio, under authority of Rule 13, Subparagraph 1 of this Court, enlarged the time for docketing this cause to November 12, 1958 (Record pages 25 and 32).

The jurisdiction of the Supreme Court to review these judgments by appeal is conferred by Title 28, United States Code, Section 1257 (2). The case presents several federal questions. Basically, the proceeding is grounded in a federal constitutional attack on a state statute and is reviewable by appeal. Elements of some questions raised, in the area of trial and non-uniform administration, smack of certiorari. The Court is respectfully sought to consider such elements as well as the direct issues in the nature of appeal under authority of *Flournoy* v. *Wiener*, 321 U. S. 253, 263; *Prudential Insurance Company* v. *Cheek*, 259 U. S. 530, 547, and *Cantwell* v. *Connecticut*, 309 U. S. 626, 310 U. S. 296.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in these cases: *Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Brown* v. *Board of Education*, 347 U. S. 483; *Gitlow* v. *New York*, 268 U. S. 652; *Kedroff* v. *St. Nicholas Cathedral*, 97 Supreme Court, Lawyers Edition 95; *McCollum* v. *Board of Education*, 333 U. S. 203; *United States* v. *Ballard*, 322 U. S. 78; *Murdoch* v. *Pennsylvania*, 319 U. S. 105; *Jones* v. *Opelika*, 319 U. S. 103; *Zorach* v. *Clauson*, 343 U. S. 306; *Morey* v. *Doud*, 354 U. S. 457; *Winters* v. *New York*, 333 U. S. 507; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *United States* v. *Brewer*, 139 U. S. 278; *United States* v. *Cohen Grocery*, 255 U. S. 81; *Toolson* v. *New York Yankees*, 346

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QUESTIONS PRESENTED

The following questions are presented by these appeals:

1. Whether Section 3773.24, Ohio Revised Code, under which the appellants were convicted and which is commonly called the Sunday Closing, Sunday Prohibitions, Sabbath Desecration or Blue Law, and which forbids any form of common labor or the mere opening of a place for transaction of any business on Sunday except for work of necessity or charity, exempting persons "who conscientiously observe the seventh day of the week as the Sabbath, and abstain thereon from doing things prohibited on Sunday" is unconstitutional because it is historically and actually a law respecting the establishment of religion, reserves time from the universal body politic for primarily religious purpose, aids and discriminates on behalf of certain religions over others, imposes a mode of religion and religious observance upon all, establishes religious criteria of "rest" and conduct and exemption from conduct, prohibits the free exercise of religion, and prohibts the right of the people peaceably to assemble?

2. Whether Section 3773.24, Ohio Revised Code, is unconstitutional in that it abridges the privileges and immunities of citizens of the United States, including the appellants, and deprives the accused of liberty and property without due process of law in that it is an unwarranted and arbitrary interference by the legislative body neither justified nor logical under the police power, and

is so broad in restraint on private rights as to be basically absurd on its face and has been in fact, accorded partially with reality only on the basis of unstandardized and discriminatory administrative discretion and lassitude?

3. Whether Section 3773.24, Ohio Revised Code, is unconstitutional in violation of due process of law as a criminal statute in that it is so vague and indefinite on its face and as interpreted by the Supreme Court of Ohio—"the word 'necessity' is an elastic one"—that men of common intelligence must guess at its meaning and differ as to its application and because it pits directly, without prior administrative consideration, the legitimate judgment of the accused against the judgment of a judge or jury at peril of criminal conviction?

4. Whether Section 3773.24, Ohio Revised Code, is unconstitutional in that it alone and in conjunction with other Ohio legislation and as interpreted by the Courts and administrative officers of Ohio denies the equal protection of the law and is discriminatory against the appellants?

5. Whether the consistent mode of administration of Section 3773.24, Ohio Revised Code, and the mode of administration of Section 3773.24, Ohio Revised Code, in direct relation to the appellants and the sudden, unannounced change of implied and long-standing administrative position, the mode of arrest and prosecution of the defendants in this particular action were so manifestly unfair and unequal that a violation of due process of law and equal protection of the law arises; whether the trial court denied constitutional privileges and defenses to the appellants by refusing to allow the introduction of evidence on that consistent mode of administration, by refusing clarification of the affidavits so that the accused were truly informed of the nature or cause of the accusation and by prejudice and predetermination so obvious as to obviate due process of law?

STATEMENT OF THE CASE

Defendant-Appellant William Kidd was the owner and operator of a small, corner grocery known as "Albert's Super Market" located in a poor neighborhood in Cincinnati, Ohio. The defendant had been open on Sundays for many years, dealing on such Sundays with a multiplicity of customers, including enforcement officials. Said store operated as a retail delicatessen, grocery and meat market, selling all such goods incident thereto including milk, meat, bread, non-prescription medicines, and beer and wine carry-out as licensed by the State of Ohio. It is a matter of common knowledge that this store and similarly situated stores, to-wit, small neighborhood grocery stores, have been open on Sundays in the City of Cincinnati and throughout the State of Ohio beyond the memory of any living person without any action by the enforcement officials of the City, County or State.

In September 1956, officials of the Retail Clerks Union placed this and several stores in the Cincinnati area under surveillance, and thereafter called on the Chief of Police of the City of Cincinnati and suggested to him a list of alleged violators of Ohio Revised Code 3773.24, requesting he cause arrests (Record pages 109-111, 117). He conducted no investigation but in turn called in two officers and instructed them to make some arrests out of the list. On September 30, 1956, a Sunday, at approximately 1:00 p.m., without prior announcement of any enforcement officials, these officers, one a man, one a women, both in plain clothes, entered Albert's Super Market. They observed several customers making purchases but made no further inquiry relative to surrounding circumstances. They then took from the shelves several pointless purchases of their own, admittedly solely for the purpose of effecting citation (Record page 102), carried them to the cashier and pre-

sented them for computation and charge. The cashier computed the purchases and accepted their marked cash tendered for the same. Thereupon the officers placed under arrest the appellants, Barbara Mills, who was the cashier, and William Kidd, the owner of the store who was present on the premises. The following day, affidavits were executed by one of the arresting officers.

The cause was tried on October 26, 1956 before the Municipal Court of Cincinnati. The evidence revealed that this store was located in a poor, highly transitory neighborhood where many residents had no refrigeration; that September 30, 1956 was a warmish day; that the business would lose money unless it operated on Sunday; that an emigrating family had made purchases of necessity in this store on the day in question; that a mother had made a purchase of medical necessity for her child in this store, although she was not certain it was the Sunday in question; that the environmental neighborhood of the store was a very poor one where persons made their purchases of foodstuff on a day to day basis as they earned, and had no means of refrigeration; that towboat operators purchased in the store; that a mother of eleven children who kept their milk on a fire escape, made several daily purchases of such milk and other food in this store, and a multiplicity of other facts tending toward an attempted definition of necessity (Record pages 70-161).

Prior to trial, defendants moved to quash, and abate the affidavits and demurred to the same. The affidavit merely charged Kidd with opening the place of business, and did not indicate whether he was charged with unlocking the door or conducting business (Record page 13). It also alleged that defendant's business was not one of charity and necessity.

The trial Court in the trial of the cause appeared intent on a quick conviction. It refused to allow evidence of long

standing, unequal enforcement. It ruled that abrupt about face of administrative policy could not be raised by a plea in abatement, but was a matter of evidence, and then refused to hear evidence on the matter. It prompted prosecution witnesses (Record page 88), it bulldozed defense witnesses (Record pages 134, 135, 145, and 146). It repealed in effect the exemptive element of "necessity" from the statute by extensive and illogical curtailments of evidence on the point. In general, the defendants were convicted with "due expedition" but not due process of law.

The validity of the Sunday laws, upon which the convictions were based, was called into question upon United States constitutional issues consistently throughout the cause. From a pre-trial motion to quash or abate the affidavits, and demurring to the same (Record pages 15 through 20), through motion for dismissal at end of prosecution's case (Record pages 111 through 114), renewed at the end of trial, motion for new trial (Record page 10) and appeal at all levels the following questions were raised and reiterated:

(a) The law is repugnant to the First Amendment to the Constitution of the United States inasmuch as it is a law respecting the establishment of religion, reserves the time of Sunday from practically all normal human, commercial, recreational and general activity to certain limited usages, of which religious attendance is paramount, aids certain religions over others, imposes a mode of religion and religious observance upon all, establishes religious criteria of "rest" and conduct and exemption from conduct, prohibits free exercise of religion, and prohibits the right of the people peaceably to assemble.

(b) The law is repugnant to the 14th amendment to the Constitution of the United States in that it violates both the privileges and immunities of the accused, de-

prives them of liberty and property without due process of law, and denies to them the equal protection of the law. The appellants were deprived of their mode of making a legitimate living by a law that truly effected no benefit to the commonweal, affected no grave or immediate danger to interests which the State might lawfully protect and in logic and in true effect has no real bearing on universal cessation from work and rest. That further even if the law were properly intentioned for general rest and relaxation, rather than its obvious historical religious purpose, then it was such an arbitrary effectuation of the same—the impossible universal imposition of a given day in the light of the infinite variety of human needs, their hourly changing and varying degree, as to be still nevertheless violative of due process of law. Still further the act—and its companion acts—and its consistently inconsistent administration—creates arbitrary classifications depriving the accused of the equal protection of the law. Finally the act—especially as specifically interpreted by the Supreme Court of Ohio in the opinion from which this appeal is taken—is so vague and uncertain and relates to such varying conditions of sociology, economy, mores, and individual emergency for interpretation as to be violative of due process of law. In the instant case, in addition, a sudden and unannounced administrative turnabout after years of allowing the operation of the defendants on Sunday under the entirely reasonable presumption that they were operating under an exemption on the face of the statute constituted violation of due process of law.

Appended hereto as Appendix "H" are excerpts from the appellant's briefs touching on the Federal constitutional issues. It has been appended, even at the risk of undue length, in order that the Court may be made more fully aware of the manner in which the federal issues were presented to the Ohio courts, there being a possibility the

published opinions may leave an erroneous impression of the raising of federal issues. Except for the concurrence, the decision reprinted in Appendix "A" seems to avoid ruling on the *federal* constitutional aspects raised.

In the Supreme Court of Ohio, the constitutional questions relating to religion, due process, and discrimination, without distinction as to the federal and state constitutions, were passed upon in the first and third syllabi of its opinion (see Appendix "A"). As to the vagueness of "necessity," the Court engaged in semantic gymnastics and escaped vagueness by talk of "elasticity." The suggestion of an infinitely variable standard enhances rather than diminishes the peril under which all men subject to its penalties know what act it is their duty to avoid in compliance with Ohio Revised Code 3773.24.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are so substantial as to require plenary consideration by this Court with briefs on the merits and oral arguments for their resolution. Each question presented involves constitutional principles which affect the basic rights of appellants herein and all citizens of the United States.

The issues raised herein are not unique to Ohio. Similar, long dormant and unenforced Sunday protective legislation exists in almost every state of the Union. Recently, and basically because of the pressures of competition in a changing mercantile environment, or as an instrumentality of labor negotiations, these laws are once again, sporadically and without a general consistency of approach, being enforced. These constitutional issues are bound to recur constantly. This Court has not undertaken to review on a plenary basis any of these issues in relation to a Sunday law since *Petit* v. *Minnesota* in 1900 (177 U. S. 164, 20 Supreme Court 666, 44 L. Ed. 716). It is foolhardy to

assert that there have not been developments in the law and a changing society since then sufficient in nature to justify reconsideration and reevaluation. The first amendment through action of the fourteenth has been brought to bear upon the states. The doctrine of the wall of separation between church and state has been, in a series of cases, defined and enunciated with more precision. In the meantime a mechanized America has undergone vast changes in social interdependence, in mores and scientific progress, changing even its concept of necessities. All this brings the religious issue under the first amendment directly before the Court for the first time, casts all the issues in a new light and calls out for plenary consideration by a twentieth century court. Is there such an obvious distinction between making available public school facilities for religious instruction and casting such a pall by force of punitive statute over practically all commercial, non-commercial, do-it-yourself, sport and amusement activities of the entire community as to leave almost only a choice of either church attendance, navel contemplation, or slug-a-bed that plenary consideration is obviated?

In the several states there have been differing conclusions on the various constitutional issues. In the instant case, Ohio saw no discriminatory effect. In *Henderson* v. *Antonacci*, 62 S. (2d) 5 (1952) and *Kelley* v. *Blackburn*, 95 S. (2d) 260, the Supreme Court of Florida, in the case of a basically similar statute, especially in the latter case, and certainly an identically similar situation if administration of the law is considered, held arbitrary discrimination and unequal enforcement of the law existed and declared the law unconstitutional. The federal issue involved in these variant decisions has been as recently discussed by this Court as *Morey* v. *Doud*, 354 U. S. 457, 77 Supreme Court 1344 (1957). Indicative of the state of indecision in relation to the guarantees of the Federal Constitution in

relation to the issues awakened by the enforcement of the sabbath desecration laws is *Mosko* v. *Dunbar*, a Colorado case, not appealed to this Court (309 Pacific (2d) 581). In that case a Sunday closing law was declared unconstitutional; a motion for rehearing was filed; during the pendency of the motion, the personnel of the Court changed; the majority of the Court as then reconstituted reversed the majority of the Court as formerly constituted and the opinion, which was originally prepared as the ruling of the Court by Chief Justice Moore, became the dissenting opinion (see ibid at page 593). Certainly it is incumbent upon the Supreme Court in such a situation to fix the cardinal points of the Constitution of the United States.

In the past seven and a half years, five cases have been brought up to this Court on various aspects of the Sunday laws. *People* v. *Friedman*, 341 U. S. 907 (1951); *State* v. *Towery*, 347 U. S. 925 (1954); *Gundaker Central Motors* v. *Gassert*, 354 U. S. 933 (1956); *Taylor* v. *Pine Bluff*, 352 U. S. 894, *certiorari* denied No. 324 (1956); *Hickinbotham* v. *Williams*, *certiorari* denied 353 U. S. 961 (1957). Of these only the *Gundaker* case and the *Friedman* case arose on appeal. The *Gundaker* case in the final analysis turned on a local traffic regulation and in the *Friedman* case counsel waived constitutional issues on trial. Now foursquare before this Court are at least three appeals on direct general Sunday law criminal convictions with constitutional issues under the Federal constitution scrupulously raised and preserved by counsel through all stages of trial and appeal. This rash of cases, after a long silence since *Petit* v. *Minnesota*, reflects not only the reawakened enforcement of archaic law, but a consciousness at the bar that this Court has effected or recognized changes in the substantive constitutional law since *Petit* v. *Minnesota*, indeed since *Gitlow* v. *New York*, 268 U. S. 652, *Brown* v. *Board of Education*, 347 U. S. 483, *McCollum* v. *Board of*

Education, 333 U. S. 203, *Cumberland Coal Co.* v. *Board,* 284 U. S. 23, *Winters* v. *New York,* 333 U. S. 507, and *Board of Education* v. *Barnette,* 319 U. S. 624, to pick only random examples, which consciousness bespeaks the need for a new constitutional evaluation of the Sunday laws and their administration. To paraphrase, a "decent respect to the opinions of mankind" suggests fresh plenary consideration.

The very constant recurrence of the question, the universality of the issue in nearly all the states, the effect on the changing mercantile establishment, the effect on civil and individual liberty, respect for and uniformity in the law in the face of the phoenix-like rise and fall of the Sunday laws from the limbo of non-enforcement, all indicate the need for a fundamental constitutional consideration. Even if the Court should feel that it has spoken in perpetuity in a changing society and law in *Petit* v. *Minnesota,* nevertheless the very recurrence of the issues of late suggest plenary consideration for precise enunciation in a modern context. An alleged police regulation even though deemed to be valid when enacted may become unconstitutional by reason of later legislation or the operation of later events. *Abie State Bank* v. *Bryan,* 282 U. S. 765. In *International Brotherhood of Teamsters Union* v. *Vogt, Inc.,* 354 U. S. 284, 77 Supreme Court 1166, the Supreme Court was presented with a question similar to one raised in a previous case in which the Court had granted the Appellee's motion to dismiss for lack of a substantial question. The Court said, at page 287, "Since the present case presents a similar question, we might well have denied certiorari on the strength of our decision in that case. In view of the recurrence of the question, we thought it advisable to grant certiorari, 352 U. S. 817, 77 Supreme Court 31, 1 L. Ed. (2d) 44 and to restate the principles governing this type of case."

The era of the automobile has caused changes in merchandising, which changes and the resistance to them have caused the resurrection of enforcement of the Sunday laws. (See Appendix "G" Article from *Time* magazine.) But the very automobile which speeds quickly across state lines has emphasized the national scope of the problem, and changes in large scale merchandising and local restraints or allowance on them must have a national effect.

However, all these arguments are not as important as the fact that the issues themselves are intrinsically fundamental and substantial under the Constitution of the United States. The history of the Sunday legislation reveals their religious nature and antecedents. (For an excellent summary of such history see: Chapters XIX and XX *Separation of Church and State In the United States,* Johnson and Yost, University of Minnesota Press, 1948.) The early decisions acknowledged this and simply justified the passage of Sunday protective legislation as an expression of national religious tradition. But in the face of the wall of separation of church and state imposed by the federal constitution, the state courts engaged in a pious hypocrisy and basically fictional approach of justifying the measures under the guise of police power. But as an exercise of police power the laws are absurd, so absurd that up until recently there has been very little or no enforcement. Their language, if construed strictly, would close up everything on Sunday or if construed in any lesser degree, yields illogical discriminations, arbitrary classification, and universal doubt as to application. (See Ohio's elasticity doctrine in this very case or *Henderson* v. *Antonacci,* 62 S. (2d) 5.) The problem has been avoided by leaving the matter as far as possible to the whim and personal prejudice of local police officers. If the legislative body cannot discriminate in such legislation by permitting some to

operate and restraining others from operating on Sunday, is there power vested in police officials or judiciary which is greater than that in the legislative branch of government? What great danger is there to fundamental constitutional rights in leaving unexamined under the effects of the 14th Amendment a restrictive law so broad that it must be accorded to everyday practicalities by the unstandardized whim of enforcement officers or the pressures of competitors, zealots, or axe grinders?

What we have here, if we engage in the fiction of police power, is an unworkable and absurd anachronism, that invades the basic concepts of the Bill of Rights and the 14th Amendment. We live in a time when this Court has refused to engage in the fiction of police power to justify unconstitutional excesses, even indeed where the most vivid threats to peace and harmony have existed or been engendered in an attempt to convince this court of the necessity of police action. So here, a law, and its administration, first historically admitted to be religious in purpose, then called police power in order to avoid the wall of separation, which law is a slip-shod, catch-all exercise of police power, is vague on its face and is made even more vague and transitory by the very court charged with its final interpretation, which protects no real interest which the state may protect (for Ohio has passed wage and hour laws for the real protection of these interests, Ohio Revised Code 4107.46 and 4109.22) should be evaluated on its constitutional merits by this Court.

The appellants allude to the jurisdictional statements filed before this Court in the similar causes of *Grochowiak* v. *Pennsylvania* (136 Atl. (2d) 145), No. 166, October Term, 1958, and *State of Ohio* v. *Coleman Ullner*, (167 Ohio St. 521, 150 N. E. (2d) 413), No. 426 October Term, 1958, and asks that the questions raised therein and discussions con-

tained therein be considered as if also advanced as part of this jurisdictional statement.

CONCLUSION

The statute of Ohio under which the appellants were convicted as interpreted and applied by the Supreme Court of Ohio and as administered by the executive branch of the State of Ohio, present to this Court several substantial federal questions under the First and Fourteenth Amendments to United States Constitution, effecting the constitutional rights of these appellants and all citizens of the United States. This Court which has not ruled substantively on similar legislation for 58 years should review these various issues in the light of society and the law today, the development of the doctrine of separation of church and state, the reality and reasonableness of police power as currently evaluated, the demarcation of understandable boundaries to legislation creating criminal acts, the current limits of discrimination and the elemental rules of fair play encompassed in due process of law. An element of the state of flux through which our nation is passing needs the clear erection of its constitutional guideposts.

Respectfully submitted,

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